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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:

USA Commercial Mortgage Company 06-10725 – Lead Case

USA Capital Realty Advisors, LLC

**USA Capital Diversified Trust Deed
Fund, LLC**
06-10727

USA Capital First Trust Deed Fund, LLC

06-10728

**USA Securities, LLC
06-10729**

Debtors.

Jointly Administered

Chapter 11 Cases

Judge Linda B. Riegle Presiding

OBJECTIONS OF THE USACM LIQUIDATING TRUST TO PROOFS OF CLAIM FILED BY THE PENSION BENEFIT GUARANTY CORPORATION

Affecting:

All Cases

Or Only:

- USA Commercial Mortgage Company
 - USA Capital Realty Advisors, LLC
 - USA Capital Diversified Trust Fund Deed, LLC
 - USA Capital First Trust Fund Deed, LLC
 - USA Securities, LLC

The USACM Liquidating Trust (the “Liquidating Trust”), by and through its counsel and pursuant to § 502 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”), Rule 3007 of the Federal Rules of Bankruptcy Procedure and Rule 3007 of the Local Rules of Bankruptcy Procedure, hereby files its objection (the “Objection”) to the amended claims of the Pension Benefit Guaranty Corporation (the “PBCG”) filed against USA Commercial Mortgage Company (“USACM”), which have

1 been designated as amended Claim Nos. 791, 793 and 794. In support of its Objection,
 2 the Liquidating Trust states as follows.

3 **JURISDICTION**

4 1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§
 5 1334 and 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a
 6 core proceeding under 28 U.S.C. § 157(b)(2)(B).

7 2. The statutory predicate for the relief requested herein is § 502 of the
 8 Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure.

9 **BACKGROUND**

10 A. **The Chapter 11 Cases and the Plan**

11 3. On April 13, 2006, USACM and four related entities identified in the
 12 caption above (collectively, the “Debtors”) filed voluntary petitions for relief under
 13 chapter 11 of the Bankruptcy Code. The Debtors’ chapter 11 cases were jointly
 14 administered by an order of this Court.

15 4. On January 8, 2007, this Court entered an order (the “Confirmation Order”)
 16 confirming the Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization (the
 17 “Plan”). The Plan became effective on March 12, 2007.

18 5. On the Effective Date, the Liquidating Trust was created pursuant to the
 19 terms of the Plan and the Confirmation Order. Under the Plan, the Liquidating Trust is
 20 the successor to USACM with respect to standing to seek allowance and disallowance of
 21 claims.

22 B. **The Pension Plan**

23 6. UASCM adopted the USA Commercial Mortgage Company Defined
 24 Benefit Pension Plan (“Pension Plan”) effective as of January 1, 1998. All new benefit
 25 accruals under the Pension Plan were discontinued and accrued benefits frozen effective
 26 as of September 30, 2006.

27

28

1 7. On January 15, 2007, the Pension Plan was involuntarily terminated by the
 2 PBGC. On January 26, 2007, the PBGC became the statutory trustee of the Pension Plan
 3 pursuant to an agreement between the PBGC and USACM.

4 8. USACM was the “contributing sponsor,” as defined in 29 U.S.C. §
 5 1301(a)(14), of the Pension Plan. Debtors USA Investment Partners, LLC, USA Capital
 6 Realty Advisers, LLC and other Debtors are also alleged by the PBGC to be a member of
 7 the “controlled group” for the Pension Plan and are jointly and severally liable for any
 8 obligations to the Pension Plan. See 29 U.S.C. §§ 1301(a)(14), (e)(2).¹

9 9. Approximately 30 former employees of USACM are participants in the
 10 Pension Plan. The participants with the largest stake in the Pension Plan include Thomas
 11 Hantges, Joseph Milanowski, Paul Hamilton and Victoria Loob (collectively, the “Insider
 12 Beneficiaries”), who were officers and/or owners of the Debtors prior to the Petition
 13 Date. The Liquidating Trust has the right to assert claims against the Insider
 14 Beneficiaries and other pre-petition employees of the Debtors pursuant to the terms of the
 15 Plan for their breach of fiduciary duties, misappropriation of corporate opportunities,
 16 conversion, state and federal RICO, fraudulent transfer and other alleged wrongful
 17 conduct prior to the Petition Date.

18 **C. The Original PBGC Claims**

19 10. On November 9, 2006, the PBGC filed three claims against USACM’s
 20 estate (collectively, the “Original Claims”). Claim No. 791 was an unliquidated claim for
 21 pension insurance premiums allegedly owed by USACM to the PBGC. Claim No. 793
 22 was an “estimated” claim in the amount of \$1,068,233 for minimum funding
 23 contributions allegedly owed by USACM to the Pension Plan. Claim No. 794 was an
 24 “estimated” claim in the amount of \$884,389 for unfunded benefit liabilities allegedly
 25 owed to the PBGC in connection with the Pension Plan.

26 1 The PBGC has recently filed claims in the following cases: *In re USA Investment*
 27 *Partners, LLC*, No. 07-11821, claims 12-14; *In re USA Investors VI, LLC*, No. 07-12377, claims
 28 44-42; and *In re Tree Moss Partners, LLC*, No. 06-13758, claims 11-9.

1 11. On March 2, 2007, USACM filed an objection to the Original Claims. The
 2 objection argued, among other things, that the Original Claims were not entitled to
 3 priority status and that they were unsupported.

4 **D. The Amended Claims**

5 12. On April 23, 2007, the PBGC filed amended Claim No. 791 in an
 6 “estimated” amount of \$120,870. Amended Claim No. 791 alleges that the PBGC
 7 possesses an administrative claim under §§ 503(b)(1) and 507(a)(2) of the Bankruptcy
 8 Code in the amount of \$112,572, consisting of (a) termination premiums in the amount of
 9 \$112,500 under 29 U.S.C. § 1306(a)(7), and (b) \$72 in post-petition flat-rate and
 10 variable-rate premiums under 29 U.S.C. § 1306(a)(3). Amended Claim No. 791 also
 11 alleges that the PBGC possesses an unsecured claim in the amount of \$8,298, consisting
 12 of (a) \$6,786 in pre-petition flat-rate and variable-rate premiums, and (b) \$1,512 in
 13 interest and penalties on the pre-petition premiums.

14 13. On April 23, 2007, the PBGC also filed amended Claim No. 793 in an
 15 “estimated” amount of \$1,211,242. The PBGC alleges that Amended Claim No. 793 is
 16 an administrative claim, pursuant to §§ 503(b)(1) and 507(a)(2) of the Bankruptcy Code
 17 and § 412(c) of the Internal Revenue Code (the “IRC”), for post-petition contributions
 18 that USACM allegedly did not make to the Pension Plan. The PBGC also alleged,
 19 apparently in the alternative, that (a) \$284,999 in post-petition contributions were
 20 “ordinary business expenses” entitled to administrative priority under §§ 503(b) and
 21 507(a)(2) of the Bankruptcy Code, and (b) \$330,602 in “contributions arising” during the
 22 180 days immediately preceding the Petition Date are entitled to priority under
 23 § 507(a)(5) of the Bankruptcy Code. Amended Claim No. 793 provides no information
 24 or other support as to how these amounts were computed.

25 14. On April 23, 2007 and on April 25, 2007, the PBGC filed amended Claim
 26 No. 794 in an “estimated” amount of \$1,700,624. Amended Claim No. 794 is styled as
 27 an unsecured, non-priority claim with an “unliquidated” priority amount. The PBGC’s
 28 statement in support of the claim, however, alleges that the portion of Claim No. 794

1 equal to 30% of the collective net worth of USACM and the members of its controlled
 2 group (a) is entitled to treatment as an administrative claim under §§ 503(b)(1) and
 3 507(a)(2) of the Bankruptcy Code, or (b) is entitled to treatment as a priority tax claim
 4 under § 507(a)(8) of the Bankruptcy Code.

5 **OBJECTIONS TO THE PBGC'S AMENDED CLAIMS**

6 **I. Applicable Authority**

7 15. Section 502(b)(1) of the Bankruptcy Code provides that this Court shall
 8 disallow a proof of claim to the extent it is “unenforceable against the debtor and
 9 property of the debtor, under any agreement or applicable law for a reason other than
 10 because such claim is contingent or unmatured.” 11 U.S.C. § 502(b)(1). While a
 11 properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f), if a party
 12 objecting to a proof of claim “produces sufficient evidence to negate one or more of the
 13 sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity
 14 of the claim by a preponderance of the evidence. The burden of persuasion is always on
 15 the claimant.” *In re Consolidated Pioneer Mortgage*, 178 B.R. 222, 226 (9th Cir. B.A.P.
 16 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996) (quoting *In re Allegheny Int'l, Inc.*, 954 F.2d
 17 167, 173-74 (3d Cir. 1992)).

18 **II. General Objections to the PBGC's Amended Claims**

19 16. The Liquidating Trust submits the following general objections to
 20 Amended Claim Nos. 791, 793 and 794 (the “Amended Claims”).

21 17. First, the Amended Claims should be disallowed under § 502(b)(1) of the
 22 Bankruptcy Code because they are unsupported. The PBGC has not met its burden of
 23 persuasion on the amount and priority of the Amended Claims. The PBGC failed to
 24 attach any actuarial assumptions, calculations or other evidence in support of the
 25 Amended Claims. Instead, each Amended Claim merely sets forth the PBGC’s alleged
 26 “estimated” damages without any supporting documentation whatsoever. Absent
 27 additional support for the Amended Claims, and the ability of the Liquidating Trust to
 28 analyze and refute such support, the Amended Claims should be disallowed.

1 18. Second, the Liquidating Trust objects to the “estimated” nature of the
 2 Amended Claims. The Liquidating Trust intends to move as expeditiously as possible to
 3 administer the USACM estate, and cannot be held up by the PBGC’s failure to assert a
 4 liquidated amount for its alleged claims. The Liquidating Trust reserves its right to
 5 estimate the Amended Claims pursuant to § 502(c) of the Bankruptcy Code in the event
 6 that such claims are not disallowed in their entirety.

7 19. Third, the Liquidating Trust objects to the Amended Claims to the extent
 8 that the PBGC seeks a double recovery from the Debtors’ estates. As stated above,
 9 USACM Liquidating Trust and certain of the other Debtors are under common control
 10 and, therefore, are jointly and severally liable to the PBGC with respect to the Amended
 11 Claims to the extent this Court allows them. See 29 U.S.C. § 1362(a). The PBGC cannot
 12 collect more than an aggregate 100% on account of its allowed claims against the
 13 Debtors’ estates. *See, e.g., In re Chene*, 236 B.R. 69, 73 (M.D. Fla. 1999) (holding that
 14 IRS was not entitled to collect more than 100% in the aggregate on account of tax debt
 15 for which the debtor and other parties were jointly and severally liable); *In re Realty*
 16 *Assocs. Sec. Corp.*, 66 F. Supp. 416, 424 (E.D.N.Y. 1946) (creditor entitled to assert full
 17 amount of its claims against the debtor only until paid in full from all sources).

18 20. Fourth, the Liquidating Trust objects to the Amended Claims to the extent
 19 that any amounts payable to the PBGC on account of such claims will be paid over to the
 20 Insider Beneficiaries. The Plan provides that the claims of the Insider Beneficiaries
 21 (Class A-6 “Subordinated Claims”) are subordinated to the allowed claims of unsecured
 22 creditors (now beneficiaries of the Liquidating Trust). *See* Plan, Classification and
 23 Treatment of Claims and Equity Interests, at 25, 33-34. The Insider Beneficiaries cannot
 24 use the Pension Plan as a “back door” to obtain distributions from the estate of USACM
 25 that otherwise are prohibited under the Plan. As such, the PBGC claims should be
 26 disallowed to the extent that they would result in any payments being made to the Insider
 27 Beneficiaries.

28

1 **III. Specific Objections To The Amended Claims**

2 **A. Objections to Amended Claim No. 793**

3 21. The Liquidating Trust objects to Amended Claim No. 793 because the
 4 PBGC has provided no basis for alleging that the entire claim, or any portion thereof, is
 5 entitled to administrative expense priority under §§ 503(b)(1) and 507(a)(2) of the
 6 Bankruptcy Code.

7 22. It is well-established that the PBGC's claim arising from a debtor's failure
 8 to make post-petition pension plan contributions pursuant to Section 412 of the IRC is not
 9 treated as a tax. *See, e.g., In re CF&I Fabricators of Utah, Inc.*, 150 F.3d 1293, 1297
 10 (10th Cir. 1998); *In re Divco Philadelphia Sales Corp.*, 64 B.R. 232, 235 (Bankr. E.D.
 11 Pa. 1986); *In re Bayly Corp.*, No. Civ. A. 95 N 901, 1997 WL 33484011, at *2-4 (D.
 12 Colo. Feb. 12, 1997).

13 23. It is equally well-established that such a claim is subject to priority
 14 treatment as an administrative claim only to the extent of the portion of the missed
 15 contribution representing the cost of post-petition benefit accruals. *See, e.g., In re*
 16 *Sunarhauserman*, 126 F.3d 811, 817 (6th Cir. 1997) (affirming disallowance of PBGC's
 17 administrative claim for all amounts except liabilities arising post-petition because "it is
 18 an absolute requirement for administrative expense priority that the liability at issue arise
 19 post-petition"); *In re Bayly Corp.*, 163 F.3d 1205, 1210-11 (10th Cir. 1998) (rejecting
 20 PBGC's position that it was entitled to an administrative claim for any unfunded benefit
 21 liabilities other than those arising from post-petition labor); *In re Kent Plastics Corp.*,
 22 183 B.R. 841, 847 (Bankr. S.D. Ind. 1995) (denying PBGC's claim for administrative
 23 expense priority where the pension plan had been frozen for six years prior to bankruptcy
 24 filing).

25 24. Here, the PBGC offers no evidence that the alleged administrative claim of
 26 \$1,211,242 represents the cost of post-petition benefit accruals arising under the Pension
 27

1 Plan.² Thus, at a minimum, Amended Claim No. 793 should be reclassified as an
 2 unsecured, non-priority claim.

3 25. In addition, the Liquidating Trust objects to the unsupported calculations in
 4 Amended Claim No. 793. The PBGC must support Amended Claim No. 793 with (i)
 5 reasonable actuarial assumptions, that (ii) only apply to accruals of minimum benefits
 6 guaranteed by the PBGC. From a preliminary review of the relevant Pension Plan
 7 documents, it appears to the Liquidating Trust that the benefit accruals with respect to the
 8 Insider Beneficiaries were consistently overstated. The Liquidating Trust objects to the
 9 inclusion of any benefit accrual for the Insider Beneficiaries in the determination of that
 10 portion of the missed plan contributions, if any, which may be entitled to priority
 11 treatment subject to a full review of the records of the Pension Plan by an actuary
 12 retained by the Liquidating Trust.

13 26. The Liquidating Trust also reiterates its general objection to Amended
 14 Claim No. 793 to the extent that any amounts payable to the PBGC on account of such
 15 claim will be paid over to the Insider Beneficiaries as benefits under the Pension Plan.
 16 Any such payments would conflict with the terms of the Plan.

17 **B. Objections to Amended Claim No. 794**

18 27. Amended Claim No. 794 alleges that the PBGC possesses an
 19 “unliquidated” administrative and/or priority claim. The Liquidating Trust objects to
 20 Amended Claim No. 794 because, just as with Amended Claim No. 793 the PBGC has
 21 provided no basis for alleging that the entire claim, or any portion thereof, is entitled to
 22 priority under §§ 503(b)(1) and 507(a)(2) of the Bankruptcy Code. *See, e.g.,*
 23 *Sunarhauserman*, 126 F.3d at 817; *Bayly Corp.*, 163 F.3d at 1210-1211; *see also CF&I*
 24 *Fabricators*, 150 F.3d at 1297 (rejecting PBGC’s position that unpaid contributions

26 2 The administrative priority for Amended Claim No. 793, if any, would be limited to the
 27 actual cost of benefits accruing from May 2006 to September 2006, when such accruals were
 reflected on the records of the Pension Plan.

1 constituted a “tax”); *Divco Phila. Sales Corp.*, 64 B.R. at 235 (holding that 29 U.S.C. §
 2 1368 did not render the PBGC’s claim a priority tax claim under the Bankruptcy Code).

3 28. In addition, Amended Claim No. 794 is overstated because the PBGC
 4 improperly estimates the amount of Amended Claim 794 using assumed rates of return
 5 on invested assets rather than the required “prudent investor” rate of earnings. In *In re*
 6 *CSC Indus. Inc.*, 232 F.3d 505 (6th Cir. 2000), the Sixth Circuit held that the “prudent
 7 investor rate”—the rate “which a reasonably prudent investor would receive from
 8 investing the funds”—was the appropriate discount rate for the claims of the PBGC. *See*
 9 *id.* at 508-09; *see also CF& I Fabricators*, 150 F.3d at 1301 (10th Cir. 1998) (same).
 10 Amended Claim No. 794 must be discounted to its present value as of the Petition Date
 11 using the “prudent investor” rate.

12 29. Amended Claim No. 794 also should be reduced on a dollar-for-dollar basis
 13 by an amount equal to any recovery realized by the PBGC with respect to Amended
 14 Claim No. 793, because any contributions to the Pension Plan would reduce the amount
 15 of any unfunded benefit liability on a dollar-for-dollar basis. This Court should also
 16 reduce the amount sought in Amended Claim No. 794 to the extent the amount of the
 17 unfunded benefit liability under the Pension Plan exceeds an amount which, when added
 18 to the value of the Pension Plan’s assets on its termination date, exceeds the present value
 19 of Pension Plan benefits guaranteed by the PBGC.

20 30. The Court should also reject any attempt by the PBGC to collect any
 21 unfunded benefit liabilities which reflect amounts improperly accrued under the terms of
 22 the Pension Plan or involve the Pension Plan not being qualified under Section 401(a) of
 23 the IRC at the time it was terminated.

24 31. Finally, the Liquidating Trust reiterates its general objection to Amended
 25 Claim No. 794 to the extent that any amounts payable to the PBGC on account of such
 26 claim will be paid over to the Insider Beneficiaries as benefits under the Pension Plan.
 27 Any such payments would conflict with the terms of the Plan.

28

1 **C. Objections To Amended Claim No. 791**

2 32. As with Amended Claim Nos. 793 and 794, the PBGC fails to establish that
 3 Claim No. 791 for \$112,572 in termination premiums under 29 U.S.C. § 1306(a)(7) is
 4 entitled to priority as an administrative claim.

5 33. First, the PBGC is not entitled to an administrative claim pursuant to the
 6 plain language of the statute. Section 1306(a)(7) provides:

7 (A) In general [i]f there is a termination of a single-employer
 8 plan under . . . section 1342 [involuntary termination] of this
 9 title, there shall be payable to the corporation, with respect to
 10 each applicable 12-month period, a premium at a rate equal to
 11 \$1,250 multiplied by the number of individuals who were
 12 participants in the plan immediately before the termination
 13 date. Such premium shall be in addition to any other
 14 premium under this section.

15 (B) Special rule for plans terminated in bankruptcy
 16 reorganization[.] In the case of a single-employer plan
 17 terminated under . . . section 1342 [involuntary termination]
 18 of this title during pendency of any bankruptcy reorganization
 19 proceeding under chapter 11 of Title 11 . . . subparagraph (A)
 20 shall not apply to such plan until the date of the discharge or
 21 dismissal of such person in such case.

22 34. A "single employer plan" is defined by 29 U.S.C. § 1002(41) as any plan
 23 that is not a "multiemployer plan." Under 29 U.S.C. § 1002(37), a "multiemployer plan"
 24 is any plan (1) to which more than one employer is required to contribute; (2) which is
 25 maintained pursuant to a collective bargaining agreement between an employee
 26 organization and an employer; and (3) which satisfies any other requirements imposed by
 27 the Department of Labor. While the Pension Plan may be a "multiple-employer plan" as
 28 more than one employer may have contributed to the plan, it was not maintained pursuant
 29 to a collective bargaining agreement between those Debtors whose employees were
 30 covered by the plan and a union or other employee organization. Thus, the Pension Plan
 31 cannot qualify as a "multiemployer plan" under the terms of 29 U.S.C. § 1002(41).
 32 Because it is not a multiemployer plan, the Pension Plan is therefore a single-employer
 33 plan to which Section 1306(a)(7)(B) applies.

1 35. As stated above, Section 1306(a)(7)(B) provides that no termination
 2 premiums are due until a debtor is discharged or its case is dismissed. Because the Plan
 3 was a liquidating chapter 11 plan, USACM did not receive a discharge. *See* Plan Section
 4 IV.H (entitled “Non-discharge of Debtors and Injunction” and stating in part that
 5 “Pursuant to Section 1141(d)(3) of the Bankruptcy Code, the Confirmation Order shall
 6 not discharge Claims against or Equity Interests in the Debtors”); *see also* 11 U.S.C.
 7 § 1141(d)(3)(A) (“The confirmation of a plan does not discharge a debtor if— (A) the
 8 plan provides for the liquidation of all or substantially all of the property of the estate”).

9 36. In addition, the USACM case has not been dismissed. Thus, any claim for
 10 such premiums is, at best, premature. In addition, as such claim does not arise until after
 11 the dismissal of the bankruptcy case, it cannot be a claim against USACM’s estate
 12 entitled to priority treatment. Accordingly, § 1306(a)(7) is inapplicable and cannot be the
 13 basis for an administrative claim.

14 37. Second, the PBGC’s claim for plan termination premiums is not entitled to
 15 administrative priority because it is impossible to characterize such statutory termination
 16 premiums as post-petition and pre-confirmation expenses incurred for the benefit of the
 17 bankruptcy estate. As stated above with respect to Claim Nos. 793 and 794, it is well
 18 established that the PBGC is only entitled to an administrative claim for benefit accruals
 19 that arise from post-petition labor and benefit the debtor’s estate. *See, e.g.*,
 20 *Sunarhauserman*, 126 F.3d at 817; *Bayly Corp.*, 163 F.3d at 1210-1211.

21 38. The estate received no benefit from the PBGC’s imposition of a statutory
 22 termination premium. The PBGC therefore is not entitled to an administrative claim for
 23 any portion of the termination premium.³

24 ³ In addition, the mere fact that termination liability under § 1306(a)(7) first became
 25 payable post-petition in this case does not mean the estate was benefited post-petition. Under
 26 analogous circumstances, courts have denied administrative expense priority to claims, even
 27 though such claims first become payable post-petition. *See In re Abercrombie*, 139 F.3d 755,
 28 758 (9th Cir. 1998) (denying administrative expense priority to attorney’s claim for fees where
 liability for the fees arose post-petition, but the contract on which entitlement to attorneys’ fees
 was based was executed pre-petition); *In re Palau Corp.*, 18 F.3d 746, 750-51 (9th Cir. 1994)
 (refusing administrative expense priority to employees who obtained a post-petition court award

1 39. Further, any attempt by the PBGC to argue that *Sunarhauserman* and its
 2 progeny do not apply to plan termination premiums would be unavailing. Because
 3 Congress does not write bankruptcy laws “on a clean slate,” this Court must assume that
 4 Congress was aware of the well established law on the PBGC’s (lack of) entitlement to
 5 an administrative claim when it enacted § 1306(a)(7). *See Dewnsp v. Timm*, 502 U.S.
 6 410, 419 (1992) (“When Congress amends the bankruptcy laws, it does not write ‘on a
 7 clean slate.’”). However, despite the explicit reference to chapter 11 cases in
 8 § 1306(a)(7), Congress failed to provide in the statute that the PBGC was entitled to an
 9 administrative claim for any termination premiums. This Court should not effect such a
 10 major change in the Bankruptcy Code priority scheme for PBGC liabilities absent a
 11 significant discussion of that change in the legislative history. *See id.* (“[T]his Court has
 12 been reluctant to accept arguments that would interpret the Code, however vague the
 13 particular language under consideration might be, to effect a major change in pre-Code
 14 practice that is not the subject of at least some discussion in the legislative history.”).

15 40. Third, assuming liability for termination premiums under § 1306(a)(7)
 16 exists (it does not), it is in the nature of a “penalty,” as opposed to a “tax,” and is not
 17 entitled to treatment as an administrative claim under the Bankruptcy Code. A penalty is
 18 “an exaction imposed by statute as punishment for an unlawful act,” while a tax is “an
 19 enforced contribution to provide for the support of government.” *United States v.*
 20 *Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996) (citation
 21 omitted); *see also PBGC v. Skeen (In re Bayly Corp.)*,⁴ No. Civ. A. 95 N 901, 1997 WL
 22 33484011, at *2-4 (D. Colo. Feb. 12, 1997) (citations omitted).

23

24

25 for back wages where work was performed for debtor pre-petition); *In re Bayly Corp.*, 163 F.3d
 26 at 1208-09 (claim not entitled to priority status “simply because the right to payment arises after
 27 the debtor in possession has begun managing the estate”) (citing *In re Amarex, Inc.*, 853 F.2d
 28 1526, 1530 (10th Cir. 1988).

⁴ The *Bayly* decision cited here is different from the *Bayly* decision cited above.

1 41. *Reorganized CF & I Fabricators* involved a bankruptcy debtor's required
 2 payment to the Internal Revenue Service of ten percent of accumulated funding
 3 deficiencies for certain pension plans. *See id.* at 215. Specifically, the issue for the court
 4 was whether the payment was in the nature of a tax (entitled to a priority) or a penalty
 5 (relegated to general unsecured creditor status). *See id.* The court held the ten-percent
 6 payment was a penalty and thus not entitled to priority. *See id.* at 225. In reaching that
 7 conclusion, the court referenced the PBGC's claim for unfunded benefit liabilities as an
 8 example of a bankruptcy liability that underscored its conclusion. *See id.*

9 42. The *Bayly* court later squarely addressed the issue of whether the unfunded
 10 benefit liability owed to the PBGC was a penalty or tax, and concluded it was not a tax
 11 intended to support and provide income for the government. *Bayly*, 1997 WL 33484011,
 12 at *4. Rather, the unfunded benefit liability was a deterrent to failed pension plan
 13 sponsors by forcing them to reimburse the PBGC for money it expended on debtors'
 14 behalf. *See id.* The same is true for termination premium liability pursuant to
 15 § 1306(a)(7). Such liability cannot be characterized as a tax entitled to priority. As in
 16 *Reorganized CF & I Fabricators* and *Bayly Corp.*, premium termination liability is akin
 17 to a penalty, intended to serve as a deterrent against future employers who are
 18 contemplating termination of their employees' pension plans.

19 43. Fourth, the Liquidating Trust reiterates its general objection to Amended
 20 Claim No. 791 to the extent that any amounts payable to the PBGC on account of such
 21 claim will be paid over to the Insider Beneficiaries as benefits under the Pension Plan.
 22 Any such payments would conflict with the terms of the Plan.

CONCLUSION

24 44. The PBGC's Amended Claims are unsupported and should be disallowed in
 25 their entirety. In addition, in the alternative, the Amended Claims are not entitled to
 26 priority either as an administrative or priority tax claim. Thus, at a minimum, the
 27 Amended Claims should be reclassified as general unsecured claims, subject to the
 28 additional objections to the amount of the claims raised herein, including the purported

1 contributions on behalf of the Insider Beneficiaries, whose claims are subordinated
2 pursuant to the terms of the Debtors' confirmed Plan of Reorganization.

3 WHEREFORE, the Liquidating Trust respectfully requests that this Court enter an
4 order pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure, (a)
5 disallowing, reclassifying and/or reducing the Amended Claims, and (b) granting such
6 other and further relief as the Court deems just and proper.

7 RESPECTFULLY SUBMITTED September 6, 2007.

8

9 **LEWIS and ROCA LLP**

10

By: /s/ RC (#006593)
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11

12 And

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1 PROOF OF SERVICE
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3 Copy of the foregoing e-mailed or mailed first class postage prepaid U.S. Mail on
4 September 11, 2007 to the following parties in interest:

5 Frank A. Anderson
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